SUMMARY OF THE ARGUMENT

Petitioner's contentions that a conflict between Circuit Courts exist is in error, when the cases Petitioner cites in support of this contention are distinguishable and materially different than this case, and Petitioner misinterprets the ERISA statute under review here. Further, Petitioner misconstrues previous decisions of this court in an effort to unjustly, unfairly, and improperly deny the Respondent a remedy available to her under ERISA for equitable relief.

ERISA §510, 29 U.S.C. §1140 was designed to protect the employment relationship. The federal district court in this case acted well within the scope of its equitable powers and its discretion in accord with ERISA §510's enforcement section §502, 29 U.S.C. §1132(a)(3)(B)'s category of "other appropriate equitable relief" for a violation by Petitioner of §510's prohibition against unlawful retaliatory discharge. The district courts award of back and front pay constituted an appropriate exercise of the Court's discretion to fashion relief of a restitutionary nature, indisputably an equitable remedy; and, is in accord with other federal court decisions as to the legislative aim of §510 and the remedies available thereunder.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT DECISION IN THIS CASE IS A CORRECT, JUST AND FAIR INTERPRETATION OF THE LAW UNDER REVIEW, AND IS IN ACCORD WITH OTHER FEDERAL COURT OPINIONS ON THE SUBJECT OF ERISA §510 VIOLATIONS AND BACK PAY AND FRONT PAY AWARDS PURSUANT TO §502(a)(3)(B).

The Sixth Circuit held that back and front pay are available equitable remedies for violations of ERISA §510[5], and other federal courts are in ac-

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[5]Contrary to Petitioner's assertion that the issue of back pay and front pay is a source of conflict, there are no other federal circuit court decisions that have reviewed a trial court's exercise of discretion to award such relief pursuant to a finding of liability for a §510 violation, through the enforcement section of ERISA §502(A)(3)(B).

cord. In Folz v. Marriott, 594 F. Supp. 1007 (1984) (Dist. Ct. Mo.), the employer, Marriott, contended, as do the Petitioners here, that ERISA was designed to protect retirement income and not salary and wages, and, therefore, back pay is not available as a remedy for a §510 illegal discharge. The Folz Court rejected Marriott's interpretation of ERISA's remedies, and determined that the illegal discharge "is the kind of discharge ERISA was enacted to prevent," and Folz held that back pay was an appropriate remedy under §502(a)(3)(B)'s "other appropriate equitable relief category", Folz 594 Fed. Supp. at p. 1015. Folz determined that ERISA legislative history indicated that the Court has broad equitable powers and compels the conclusion that this Court's equitable power under ERISA is broad enough to recreate the circumstances that would have existed absent an employer's illegal conduct, Folz, 594 Fed. Supp. at 1015.[6]

In Bittner v. Sadoff and Rudoff Industries, 490 Fed. Supp. 534, the Court held that back pay under §502(a)(3)(B)(i) was an appropriate equitable remedy for a §510 violation. The Bittner Court found that when considering a §510 violation, "chief among the equitable remedies is the remedy of restitution."[7]

The decisions in Folz and Bittner declare that the remedy of back pay for a §510 violation is clearly available under §502(a)(3)(B).[8] Further, the decision below upholding a front pay award in lieu of reinstatement (indisputably an equitable remedy), and determining such relief to be available under §502(a)(3)(B)(i) is a reasonable interpretation of ERISA §510 under the facts in this case, and Petitioner advances no compelling argument to limit the trial court's discretion to provide such a remedy. Petitioner offers neither federal appellate nor district court decisions that are contrary to the Sixth Circuit decision in this case, and his Petition should be denied.

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[6]Folz cites Kross v. Western Electric Co., Inc., 701 F. 2d 1238 (7th Cir. 1987) for its holding that ERISA is a remedial statute to be liberally construed.

[7]Bittner citing Rogers v. Loether, 467 F. 2d 1110, 1117 (7th Cir. 1992).

[8]See also, in accord, Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503, 1515 (N.D. Ill. 1986).

II.

THE SIXTH CIRCUIT HOLDING IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioner contends that the Sixth Circuit opinion failed to consider this Court's decision in Mertens. To the contrary, the Court below fully considered the issue here in light of Mertens and Judge Joiner held that Mertens' recognition of restitution as a form of relief typically available in equity is consistent with the district court's award here of back pay and front pay, relief which is restitutionary in nature. (See App. I to Petitioners' Writ at page A18-24). Further, the relief sought in Mertens is clearly different than the remedy of restitution sought by Schwartz in this case. As pointed out by Justice Scalia, Mertens is not a case where Petitioners "seek a remedy traditionally viewed as 'equitable', such as injunction and restitution", Mertens, 124 L. Ed. 2d at p. 169.

Next, Petitioner contends that because Respondent did not work after being discharged, she did not confer any benefit upon her employer, and that she should not be awarded restitution. This argument is without merit, and was rejected by the Court below. The Court below determined that, while restitution generally is awarded to prevent unjust enrichment to the defendant, that is not required in every case, see App. I to Petitioner's Writ, page A23.

Petitioner misstates the Restatement of the Law of Restitution when he asserts that unjust enrichment is a prerequisite to awarding restitution, and that the person sought to be held liable for restitution possesses some benefit which should properly be disgorged, see Petitioner's Writ at p. 26. A reading of the complete text of the law of the Restatement of Restitution indicates that the Petitioner has selectively quoted from these volumes in an effort to place an unduly restrictive definition upon the remedy of restitution. In this regard, the Court's attention is directed to the following language from the Restatement of the Law of Restitution, Chapter 1 Introductory Matters, §1 Unjust Enrichment, Comment: (e):

> "On the other hand, a person who has been unjustly deprived of his property or its value or the value of his labor may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby."

Therefore, contrary to Petitioner's representations on the law of Restitution, the facts of this case do fit within the definition of the equitable remedy of restitution. As Judge Joiner stated, restitution may be made in the form of monetary relief, and Respondent Schwartz's equitable action under ERISA entitles her to back pay as restitution to restore her to the position she occupied prior to her wrongful discharge, see App. I to Petitioner's Writ at p. A 22,23.

The Sixth Circuit further found that this Court in Mitcheli v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) decided that district courts have the equitable power to award lost wages to compensate employees wrongfully discharged in retaliation for asserting their rights under the Fair Labor Standards Act, see App. I to Petitioner's Writ at p. A21. The Court below went on to say that the back pay in Mitchell, as with Schwartz, "operates to restore to the Plaintiff that to which she would have enjoyed but for the employer's illegal retaliation." (App. I to Petitioner's Writ at p. A22).

Petitioners argue that the Court below misconstrued the Mitchell decision, and its decision is inconsistent therewith. In support of his argument, Petitioner contends that the Mitchell holding approved back pay as a restitutionary form of relief under the first cause of action, but did not approve this type of relief in the second cause of action for wrongful discharge. This is not what the Mitchell Court held, and it is the Petitioner who misreads Mitchell, not the Sixth Circuit.

This Court in Mitchell determined that the employee was entitled to the remedy of lost wages as restitution pursuant to the statute under review, the Fair Labor Standards Act of 1938, §15(a)(3), 29 U.S.C. §215(a)(3) (FLSA). The employee in Mitchell, like Respondent Schwartz, sued his employer for relief after the employer discharged him for enforcing his rights under the FLSA. The employee in Mitchell sued originally for overtime compensation and other deficiencies in the wage owed him by the employer. The employer retaliated by discharging the employee and a second cause of action arose under FLSA.

Petitioner's argument contends, erroneously, that the Mitchell Court approved back pay as restitution under the aggrieved employee's first cause of action where services were performed and not duly compensated, distinguishable from the second cause of action based upon wrongful discharge. Fol-

lowing this line of reasoning, Petitioner argues that in the second cause of action, the employer does not receive any benefit after the discharge, and the damages flowing therefrom cannot be restitutionary in nature.

The Mitchell Court does not, however, speak to the employee's first cause of action for loss of income due to deficiencies in pay. Mitchell addresses the second cause of action for wrongful discharge under the FLSA, and speaking for the Court, Justice Harlan said the question was whether in an action regarding wrongful discharge the remedy of reimbursement for loss of wages is available under the statute, Mitchell, 361 U.S. at p. 289. Petitioner, however, disregards the Mitchell Court's clear and unmistakable decision that the district court's award of back pay was restitutionary, and in a rambling, disjointed discussion of Mitchell, employing specious reasoning, the Petitioner concludes, erroneously, that the back pay in Mitchell is distinguishable from the back pay awarded to Schwartz, see Petitioner's Writ at p. 19. Petitioner's conclusion is also contrary to this Court's holding in Chauffeurs, Teamsters and Helpers Union Local No. 391 v. Terry 494 U.S. 558 (1990), which recognized the relief in Mitchell of back pay as restitutionary, Terry, 494 U.S. 558, 571.

And not insignificantly, Petitioner overlooks Mitchell's disapproval of the position Petitioner advances here concerning Respondent's entitlement to Restitution for back pay and front pay, wherein the Mitchell Court holds that the employer "cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services", Mitchell 361 U.S. 288, 293.

Petitioner also misinterprets this Court's decision in Terry, and concludes that the Sixth Circuit decision in this case is inconsistent with the principles therein. This Court in Terry examined back pay sought pursuant to the National Labor Relations Act, 29 U.S.C. §159(a) (1982) (NLRA). While the Terry Court determined the back pay in that case to be legal in nature, this Court, in its wisdom, also recognized that back pay can be restitutionary, citing Mitchell as an example, see Terry, 494 U.S. 571. Terry was also careful to limit its characterization of back pay to the statute's interpretation under its purview, the NLRA, and to distinguish back pay under the NLRA

from relief sought for back pay pursuant to other federal statutes. Wherefore, Terry held: "Thus, the remedy sought in this duty of fair representation case is clearly different from back pay for violations of Title VII, see Terry, 494 U.S. at p. 572. Hence, as Terry points out, "the remedies appropriate for unfair labor practices may differ from the remedies for a breach of duty of fair representation, given the need to vindicate different goals," see Terry, 494 U.S. at p. 573.

Likewise, the remedies for a retaliatory discharge under ERISA §510 for back pay pursuant to §502, are clearly different than the remedies sought in Terry. Respondent Schwartz says, therefore, that the Terry holding clearly recognizes the equitable relief awarded to her as an appropriate restitutionary remedy and further, Terry is not inconsistent with the Sixth Circuit decision in this case as Terry does not address the remedies under the ERISA framework, and limits the scope of its decision to the NLRA.

III.

§510, 29 U.S.C. §1140 WAS ENACTED BY CONGRESS TO PROTECT THE EMPLOYMENT RELATIONSHIP AND CREATES A CAUSE OF ACTION FOR RETALIATORY DISCHARGE.

Petitioner argues, erroneously, that the legislative purpose of §510 was to protect pension plan entitlement, and not the employment relationship per se, see Petitioner's Writ of Certiorari at page 49. This contention is contrary to the legislative aim of §510 as interpreted by federal courts[9], and was rejected by the Sixth Circuit, wherein Judge Joiner stated that ERISA §510 protects the employee against illegal discharge and "the plain language of the statute creates a cause of action based on an employer's retaliation for an employee's exercise of a right to which she is entitled, not just under a ben-

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[9] See, e.g., Folz 594 F. Supp. 1007, 1016 (1984), the Court under ERISA's remedial aims has the equitable power not limited to mere reinstatement of pension plan benefits. The Court concludes it has the equitable power under ERISA to put the Plaintiff "back into the position he enjoyed before the discharge, including back pay, reinstatement, restitution, and any other relief necessary to make him whole." See also, Conkwright v. Westinghouse Electric Corp., 933 F. 2d 231, 236 (4th Cir. 1991); McGath v. Auto Body North Shore, Inc., 7 F. 3d 665, 667-669 (7th Cir. 1993).

efit plan, but under ERISA itself. Simply put, intent to interfere with the attainment of benefits under a plan is not an element of a retaliation claim such as that made by Schwartz," see, App. I to Petitioner's Writ at page A-15.

Petitioner also misconstrues the Sixth Circuit case of West v. Butler, 621 F. 240 (6th Cir. 1980), see Petitioner's Writ at p. 49. The Court in West interprets the legislative aim of §510 is to protect the employment relationship, and West does not hold, as Petitioner contends, that §510 was intended to protect the pension rights which resulted from the employment relationship. In McGath v. Auto Body North Shore, Inc., 7 F. 3d 665 (7th Cir. 1993) in referring to the West decision, the Seventh Circuit Court said, noting agreement with their colleagues in the Sixth Circuit: "Congress designed §510 primarily to protect the employment relationship that gives rise to an individual's pension plan rights, . . . this means that a fundamental prerequisite to a §510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way," see McGath, 7 F. 3d at 668, 669. The focus of §510, then, is upon the employment relationship.

Petitioner, however, misstates the plain language of §510, at page 51 of his Writ For Certiorari, when Petitioner contends that back pay and front pay are not necessary remedies to effectuate the legislative goals of §510. Under Petitioner's reading of the statute, the legislative aim of §510 to prevent and make unlawful the kind of egregious retaliatory discharge that occurred in this case would be defeated. And, under Petitioner's reading of §510, the plain language of §510 regarding the provision for relief governed by §502(a)(3)(B)(i) would be ignored, thereby depriving employees of an enforcement tool, or remedy to redress a violation for unlawful discharge. Petitioner further argues, in error, that the Sixth Circuit decision expanded the scope of the remedies under §502(a), see Petitioner's Writ For Certiorari at page 52. Petitioner's argument, however, is premised on a myopic view of §510, wherein Petitioner incorrectly assumes that §510's aim is to encompass only pension plan rights, when §510 was enacted to safeguard against the kind of retaliatory discharge that occurred in this case, among other rights thereunder.

Respondent Schwartz asserts that this case is illustrative of the kind of

protection ERISA was intended to provide to a pension plan participant, who was wrongfully discharged under §510; and, that the back and front pay award under the facts of this case, the abundant evidence establishing an actionable wrongful discharge under §510, is consistent with the remedial nature of ERISA, and within the scope of the Court's equitable powers under §502(a)(3)(B) to fashion appropriate relief.

IV.

PETITIONERS' CONTENTION THAT THE SIXTH CIRCUIT DECISION IN THIS CASE IS IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS IS WITHOUT MERIT.

Since Petitioner relies on three cases to support its argument that a conflict exists thereby creating jurisdiction in this Court to settle the issue, Respondent should indicate why the decisions in these cases of Waldrop, Crocker, and Setser, are inapplicable here.

First, none of the three cases speak even tangentially to the ERISA Statute under review here, and the decisions, therefore, are not dispositive of the issues in this case.

Second, Petitioners' attempt to apply the holdings in Waldrop, Crocker and Setser to the instant case is based on flawed analysis. Petitioner argues in his brief at page 33, footnote 8 that the basic elements of Crocker, Waldrop and Setser are the same as the case at bar, and that the only difference - the particular statute under review - has no impact on the underlying analysis of these Courts with respect to its characterization of back pay as the equitable remedy of restitution. Even a cursory reading of these cases reveals that Petitioner misinterprets the opinions of these Circuit Courts.

Petitioners' argument rests on the false assumption that the particular statute under review by these Appellate Courts is irrelevant to the Court's determination of the nature of back pay when, in fact, the Courts each scrutinize the statute under its review in terms of how the statute defines or does not define the relief sought thereunder. Central to the Crocker court inquiry, for example, is its analysis of the Federal Aviation Act wherein the Court states: "Here, of course, we have no statutory provision creating the cause of action or identifying the available remedies," Crocker, Id. at 749. ERISA, on the other hand, clearly has language under §502 creating the cause of

action and setting out the remedies.

Further illustrative of the Courts focus on the statute under review is the Crocker Court acknowledgment that the remedy is dependent upon the statutory scheme wherein the Crocker Court says that the U.S. Supreme Court has characterized lost wages and back pay remedies as equitable when the power to award such amounts was derived from a statutory grant of authority, Crocker, 49 F. 3d at p. 748.

Hence, the key to the Crocker Court's characterization of the nature of the remedy of lost wages is the statute under review, and the Crocker Court makes clear that the Court's equitable powers are derived from the statute when it states: "The Court characterized this implied power as equitable, not because lost wage relief sounds in equity, but rather because it arose derivatively from the equitable injunctive powers granted by the statute", citing Mitchell, see Crocker, at p. 740.

Thus, Petitioner misinterprets the Crocker holding as one in conflict with the Court decision below when Crocker clearly recognizes that the District Court has explicit power to enjoin retaliatory discharges and award whatever supplemental relief necessary to further the purpose of the statute including lost wages, Crocker, 49 F. 3d 735 at 748.

Petitioner also misapplies the holdings in both Waldrop and Setser to this case. In Waldrop, central to the Court's inquiry were two federal statutes, materially different than ERISA, and inapposite to the case at bar.

Appellant Waldrop sought relief in the form of reinstatement to her former position as she was discharged in violation of her rights under (1) Age Discrimination in Employment Act of 1967 [10] ("ADEA") and the (2) Rehabilitation Act.[11]

Clearly, the Waldrop Appeals Court decision does not speak to ERISA and is not dispositive on the issue before this Court. Instead, Waldrop addresses §504, the statute under its purview.[12] The Waldrop Court looked to

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[10] 29 U.S.C.A. §621 to 634.

[11] 29 U.S.C.A. §701-796 f-6 (West 1985 & 1994 Supp.) (§504, or "Rehabilitation Act").

[12] Significantly, the Waldrop Court states its analysis is to put the request for a back pay award under §504 against the framework of restitution law to determine whether back pay constitutes legal or equitable relief, Id. at 158. This analysis under §504 is ignored by Petitioner when Petitioner asserts that the statute has no import.

the language of the "ADEA" and the "Rehabilitation" Act for guidance and found that neither statute contained provisions indicating the procedures involved in suits by private parties, nor did they set forth the remedies available for violations of the statute. Whereas, in the case, sub judice, §502(a)(3)(B) makes provision for who may file a civil suit and the remedies thereunder, clearly distinguishable from the Waldrop case.

Due to the lack of statutory language identifying remedies in both Crocker and Waldrop, these Courts analogized to other comparable federal statutes such as Title VII, 42 U.S.C. §2000-5(a)(l) of the Civil Rights Act, and §17 of the Fair Labor Standards Act, 29 U.S.C. §217 in order to determine whether these statutes were comparable to the lawsuit under review, and to ascertain the nature of the remedy of back pay - equitable or legal. This approach by the Courts in Crocker and Waldrop evidences the courts focus upon the grant of authority derived from the statute under review, and further makes clear the governing role of the statute under the Courts purview, contrary to the faulty assumption by Petitioner that the particular statute is irrelevant to the issue of whether back pay is an available remedy.

Petitioner additionally contends that the Court of Appeals in Setser v. Novack, 638 F. 2d 1137 (1980) is a decision in conflict with the opinion of the Court below. Again, Petitioner misstates the pronouncement of the law as set forth in this case, as Setser does not speak to ERISA, but instead interprets the remedy of back pay within the context of an action pursuant to 42 U.S.C. §1981, a statute obviously dissimilar to ERISA §502, and one in which there is no provision for remedies. The Setser Court determined the remedy available within the context of §1981, and, therefore, is not dispositive of the issue before this court, and is not in conflict with the Sixth Circuit's interpretation of ERISA in this case.

In fact, each of the Courts in Crocker, Waldrop and Setser analogize to statutes other than ERISA evidencing further the dissimilarities in the opinions and reasoning of these cases when compared to the decision of the Court below. In sum, Petitioner's contention that these three cases represent a conflict with the decision of the Sixth Circuit in this case is unsupportable, as these cases are distinguishable as a matter of law.

CONCLUSION

Respondent prays that the Court deny Petitioner's Writ For Certiorari because the decision of the Court below is not in error, there is no conflict among the various Circuit Courts on the issue before this Court, the decision below is not inconsistent with this Court's previous opinions on the issue here, and this case presents no issue appropriate for the Court's review.

Respectfully submitted,

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